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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

FERNANDO TAPIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

I. WHETHER CONTINGENCY FEE IMMUNITY AGREEMENTS WITH PREVIOUSLY CONVICTED CRIMINALS VIOLATES A CRIMINAL DEFENDANT'S DUE PROCESS OF LAW PROTECTED UNDER THE FIFTH AMENDMENT?

II. WHETHER GOVERNMENT VIOLATES A CRIMINAL DEFENDANT'S COMPULSORY PROCESS WHEN HAVING AN INDICTMENT RETURNED CHARGING THE DEFENSE WITNESS FOR PERJURY BASED UPON THE DEFENSE WITNESS'S TRIAL TESTIMONY WHICH EXONERATED THE DEFENDANT RESULTING IN A HUNG JURY?

III. WHETHER THE KNOWING USE OF PERJURY TO FABRICATE A CRIMINAL CASE VIOLATES A DEFENDANT'S DUE PROCESS OF LAW CONSTITUTING A MISCARRIAGE OF JUSTICE?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FERNANDO TAPIA petitions for writ of certiorari review of the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

I

OPINION BELOW

On March 4th, 1993, the United States Court of Appeals for the Eleventh Circuit rendered unpublished summary affirmance of the jury verdict from the District Court. [Exhibit "A" attached] On May 13th, 1993, the United States Court of Appeals for the Eleventh Circuit denied timely petition for rehearing with the suggestion for rehearing en banc. [Exhibit "B" attached] This constitutes the relevant orders on appeal in this court.

II

JURISDICTION

The unpublished memorandum of the Court of Appeals for the Eleventh Circuit was entered March 4th, 1993. Timely rehearing was denied May 13th, 1993. Petitioner properly invokes this court's jurisdiction pursuant to Title 28, United States Code, § 1254(1).

III

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, *United States Constitution:*

No person shall . . . be deprived of . . . liberty . . . without due process of law. . . .

Sixth Amendment, *United States Constitution:*

Every criminal defendant is entitled to . . . public trial by jury . . . to confront witnesses against him . . . to counsel . . . to compulsory processes . . . to a speedy trial. . . .

IV

STATEMENT OF THE CASE

A. JURISDICTION IN THE DISTRICT COURT.

The United States District Court for the Southern District of Florida had jurisdiction pursuant to Title 18, United States Code, § 3231 by way of Title 21, United States Code, Section(s) §§ 952(a) & 963 (Count One); Title 21, United States Code, Section(s) §§ 952(a) & 960(a)(1) (Counts Two through Four); Title 21, United States Code, Section § 848 (Count Five); Title 26, United States Code, Section § 7206 (Counts Six through Eight).

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

Between 1982 and 1985, individuals employed at Eastern Airlines in Miami, Florida, implemented a

scheme to secrete cocaine inside of the bodies of commercial jets from Colombia to Miami International Airport where the cocaine would then be removed. In late 1985, five supervisors directly involved in this importation scheme were granted immunity from prosecution. In 1986, the Eastern Airlines trial commenced at which time twenty-four individuals were indicted. Ruy Martinez, the head of the "Martinez Organization," was charged with conducting a continuing criminal enterprise. Bobby Washington, the first of the individuals to tip government off, was a star witness. Rick Rahm, Kyle McMahan, Craig Koenig, granted immunity in the 1985 agreement with government, were vital to government's knowledge of the organization.[1]

Following government's successful prosecution of the "Martinez Organization," which included conviction of ramp servicemen Anchia and Camejo in counts nineteen and twenty, the July 6, 1983 100 kilogram seizure at MIA, government reapproached the Eastern Airlines immunized witnesses in late 1988 in order to renew plea agreements which, similar to the 1985 agreements, required cooperating witnesses to make full and complete disclosure of all cocaine importations. Failure to cooperate by making full and complete disclosure of information would thereafter behalf, was a critical defense witness whose testimony turned the case in petitioner's favor, resulting in a hung jury. On the heels of this result,

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[1] The "Eastern Airlines" trial was replete with debriefings that consistently indicated petitioner was not in any way involved in the importation of cocaine at Miami International Airport.

government had a grand jury indictment returned against Carlos Ehrman to intentionally deprive compulsory processes in petitioner's retrial. Likewise, during the retrial, government immunized witnesses gave visibly perjurous versions directly contradicting their 1985 plea agreement debriefings against the "Martinez Organization," as well as petitioner's first trial versions. At no time did government bring to the court's attention the witnesses were committing perjury. This is not to ignore the fact that at one point, Miguel Tapia was charged in the Eastern Airlines trial, however, the prosecutor excised him from that indictment, and had a superseding indictment returned in petitioner's case which now contained Miguel Tapia's July 6, 1983 offense, one which had previously been attributed to two defendant's in the "Martinez Organization." The prosecutor similarly had petitioner indicted with an August 24, 1985 seizure of cocaine which he then transposed into the San Martin conspiracy, yet another defendant originally charged in the "Martinez Organization."

Petitioner urges this court to grant certiorari review for the purpose of establishing limitations on use of contingency fee immunity agreements with previously convicted criminals. Indeed, such agreements undermine the integrity of the judiciary by virtue of the fact criminals will commit perjury in order to gain a reduction of their previously imposed prison terms. It is further urged certiorari review should be granted for the purpose of establishing a guideline which precludes government from having a criminal defendant's compulsory processes undermined by indicting a critical defense witness for the

purpose of eliminating credible testimony which exonerates a defendant of government allegations. Last, certiorari review should be granted for the purpose of establishing and expanding the outrageous governmental misconduct analysis to knowing use of perjury and case fabrication. The instant case indicates government has exceeded all limitations of discretion and in fact created a criminal case in which petitioner has been sentenced to life in prison consecutive to forty years based entirely upon knowing use of perjury.[2]

Petitioner presents a record which compels review in this court. An innocent citizen has been condemned to a loss of liberty for the rest of his life on testimony which is so lacking in any indicia of reliability that the integrity of the judiciary is undermined by the present convictions.[3]

ARGUMENT

A. REASONS FOR GRANTING THE WRIT.

Petitioner's Fifth Amendment due process rights were deprived through government's use of contingency fee based plea agreements and knowing use of perjury to obtain convictions.

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[2] A generous description of the prosecutor's conduct in the instant case can be coined as shocking. Review of the record indicates the testimony of immunized witnesses is wholly contradictory at each new proceeding.

[3] In petitioner's first trial, immunized witness testimony directly contradicts the 1985 debriefings. In petitioner's second trial, yet another version is purported by the prosecutor and immunized witnesses.

Petitioner's Sixth Amendment right to compulsory process was violated when government indicted a critical defense witness for perjury based upon that witness's testimony which resulted in a hung jury and mistrial.[4]

B. THE MERITS.

I. WHETHER CONTINGENCY FEE IMMUNITY AGREEMENTS WITH PREVIOUSLY CONVICTED CRIMINAL'S VIOLATES A CRIMINAL DEFENDANT'S DUE PROCESS OF LAW PROTECTED UNDER THE FIFTH AMENDMENT?

It is well established legal principle that contingency based plea agreements are offensive to the due process clause of the Fifth Amendment. ***Williamson v. United States,* 311 F.2d 441, 444 (5th Cir. 1962)** In *Williamson,* the Fifth Circuit initially confronted the concept that ordered liberty and the integrity of the judiciary was threatened when government stooped to use of admitted criminals in order to pre-target individuals for the purpose of gaining criminal convictions. Adopting the *Williamson* rationale in ***United States v. Cervantes-Pacheco,* 800 F.2d 452 (5th Cir. 1986) (en banc),** it was appropriately held:

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[4] "AOB" shall denotes the appellant's opening brief in the lower court. "GRB" shall denote the government's response brief in the lower court. "R" followed by a number shall denote the volume of the trial transcript. "GX" shall denotes government exhibits. "DX" shall denote the defendant's exhibits in trial.

> "We conclude . . . that the testimony of the government's main witness, informant Kelly, is inherently untrustworthy and should have been excluded as such . . .
> One of the basics of our jurisprudence is the search for truth, and by this is meant not the purchased truth, the bartered-for truth, but the unvarnished truth that comes from the lips of a man who is known for his integrity. A corollary of our search for truth, a component thereof, is that the plaintiff or defendant, prosecution or defense, as the case may be, vouches for the truthfulness and the integrity of its witnesses. The government in its prosecution efforts should be like Caesar's wife, above or beyond reproach. It may be that we must live with bargained-for pleas of guilty. But we do not have to give a receipt stamped 'paid in full for your damaging testimony' or 'you will be paid according to how well you can convince the jury though it be in the face of lies.' "

***Cervantes-Pacheco, Id.* at p. 460 (citations omitted) (emphasis added)**

How visionary the *Cervantes-Pacheco* analysis captured the taint which accompanies "purchased" testimony, be it in the form of an informant acting as the investigative arm of law enforcement, or the self serving opportunist who intends to minimize his sentence exposure by the quantity and quality of testimony he gives against another individual. These precise concerns require an independent and comprehensive analysis by this court in certiorari review. This is to say that on November 14, 1985, five supervisors employed at Eastern Airlines at Miami International Airport, entered into

immunity agreements with the United States Attorney's Office to "fully and completely disclose all information related to cocaine smuggling at MIA." [AOB at pp. 13-17; 27-29] During the initial debriefings, none of the cooperating individuals implicated petitioner with the exception of Rick Rahm who claimed he'd heard petitioner may be involved with importing cocaine, but he'd never worked for petitioner. In September of 1986, the Eastern Airlines indictment was returned against Ruy Martinez and some twenty-three additional participants in the "Martinez Organization." Sixty-two separate offenses were charged. Count nineteen and twenty of the "Martinez" indictment alleged defendants Anchio and Damajo were responsible along with Ruy Martinez of importing the July 6, 1983 one hundred kilograms Miguel Tapia was apprehended with and sentenced to prison in November of 1984. Similarly, the August 24, 1985 seizure of three hundred kilograms of cocaine was charged against both Martinez and defendant San Martin.[5]

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[5] A review of the plea agreements indicates the following:
KYLE McMAHAN: Enters immunity agreement November 14, 1985. Claims to have never worked for petitioner. Worked exclusively under the direction of Ruy Martinez. Enters renewed immunity agreement with government to testify in the prosecution of petitioner. Is not charged with perjury for breaching first agreement when failing to disclose involvement in the alleged Tapia Organization. [GX-39]
CRAIG KOENIG: Enters immunity agreement November 14, 1985. Claims he heard Tapia involved in cocaine importation during debriefing. Worked exclusively for Ruy Martinez. Enters renewed agreement with government to testify in prosecution of petitioner. Is not charged with perjury for breaching first

Turning to the principles set forth in ***Cervantes-Pacheco*, 800 F.2d 452 (5th Cir. 1986)**, grounded in the

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agreement when failing to disclose involvement in the alleged Tapia Organization. [GX-38]
RICK RAHM: Enters immunity agreement November 14, 1985. Claims he supervised some thirty flights for Ruy Martinez Organization. Similarly claims he never worked for petitioner. [GX-37]
FIDEL ZAMBRANO: Involved in international cocaine trafficking for last twenty years. Apprehended in Tampa, Florida importing multi-ton loads of cocaine. Enters into plea agreement with government on July 21, 1988 for use immunity against petitioner. Has made multiple millions of dollars in importation of cocaine. Claims he has no assets. [GX-40; GX-41]
RUY MARTINEZ: Is admitted head of the "Martinez Organization" which has imported approximately thirty-five tons of cocaine into MIA between 1982 and 1985. Has made approximately seven million dollars which were to be forfeited to the government. Lied to Judge Scott surrounding his wealth resulting in rejection of first plea bargain with government. Continuing Criminal Enterprise offense dropped in exchange for guilty plea. Enters into agreement with the government in July of 1988. [GX-80] Claims wife has abscounded to Colombia with his seven million dollars. When forfeiting assets to government, gave Panamanian account which contained $315.00 as opposed to seven million dollars.
VICTOR MIYARES: Is initially indicted February 17, 1989 along with petitioner. In July of 1989, following fear that Fidel Zambrano is implicating him in multiple offenses, enters into plea agreement with the government. Previously commits perjury to gain acquital in one kilogram sale of cocaine in federal court. Sentencing on multi-kilogram conspiracy to distribute cocaine in New Jersey deferred pending outcome of quantity and quality of trial testimony in petitioner's prosecution. Sentence of fifteen years on one count of conspiracy to import cocaine and five years concurrently on tax violation to be reduced in instant case once trial completed. [GX-22]

dictum of the *Williamson Court* disapproval of contingency based arrangements with government informants, the Eleventh Circuit has consistently held that a key factor which underscores whether or not a criminal defendant has been deprived due process of law turns on whether the contingency payment is for investigative use of informants, or for testimonial use of informants. For instance, in *United States v. Rey*, **811 F.2d 1453 (11th Cir. 1986)**, it was held that as long as the use of contingency payment was confined to investigative work, then no due process violation has occurred. Similarly, in *United States v. Sanchez*, **790 F.2d 1561 (11th Cir. 1986)**, *United States v. Shearer*, **794 F.2d 1545, 1549-50 (11th Cir. 1986)** and *Owens v. Wainwright*, **806 F.2d 1519, 1522 (11th Cir. 1986)**, the Eleventh Circuit has firmly established that "investigative use" contingency arrangements are permissible. However, the Eleventh Circuit has never approved this "contingency payment" method employed when the quality and quantity of testimony shall result in what benefits a cooperating individual shall enjoy.[6]

GARY DUKES: Enters plea agreement with government in April of 1990 for the sole purpose of the quality and quantity of testimony he gives against petitioner in exchange for reduction of nine year term of imprisonment received in the "Martinez Organization" case to which he previously plead guilty on. Forfeits $125,000 in illegal assets. History of mental disorder. [GX-35]

For the purposes of this argument, it must be emphasized that these nefarious individuals gave varying renditions of their offenses which have arguably resulted in various defendants in separate conspiracies all suffering conviction on the same importation.

[6] In *Bonner v. City of Prichard*, **661 F.2d 1206 (11th Cir. 1981) (en banc)**; *Stein v. Reynolds*, **667 F.2d 33, 34 (11th Cir.**

It is petitioner's contention more than a few reasons exist warranting certiorari review. Preliminarily, the Eleventh Circuit held in ***United States v. Rey*, 811 F.2d 1453, 1456 (11th Cir. 1987)**, that in rare cases, use of contingently motivated informants might, conceivably, be so outrageous as to violate due process. ***Id.* at 1456 (emphasis added)** (citing) ***United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973); *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1953)** This conviction must be overturned when government conduct in a given criminal circumstance is so extensively unethical that it may be characterized as violative of "fundamental fairness, shocking to universal causes of justice." ***Russell*, 411 U.S. at 432, 93 S.Ct. at 1643 (in original)**. Examining the "rare case" factor, petitioner has been unjustly convicted and sentenced to life in prison with forty years consecutively and a $100,000 fine, with an additional forfeiture of vehicles, a boat and various other property belongings predicated solely upon government's pre-targeting of petitioner and subsequent contingency agreements with admitted criminals who concededly committed perjury on numerous occasions. Government orchestrated the prosecution under such terms. This, of course, constitutes the "rare cases" analysis of ***Russell***. But the inquiry does not stop here. Review next turns on the totality of circumstances without any single controlling factor. ***United States v.***

1982), all decisions of Unit B in the Fifth Circuit were adopted for both precedential authority and records purposes. In *ITT Rainer, Inc. v. United States*, 651 F.2d 343, 345 n.2 (5th Cir. Unit B; 1981), it was held "judicial notice" could be recognized by all courts.

Tobias, **662 F.2d 381, 387 (5th Cir. Unit B), cert. denied, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982)** Testing the fundamental fairness factor of ***Russell***, appropriately applied to contingency fee pre-targeting instances where prosecution was the intended use of the purchased testimony of cooperating individuals, ***Sanchez*, 790 F.2d 1561 (11th Cir. 1986); *Shearer*, 794 F.2d 1545, 1549-50 (11th Cir. 1986); *Williamson*, 311 F.2d 441, 444 (5th Cir. 1962)**, the record clearly demonstrates government's conduct was outrageous, shocking the concepts of ordered liberty. Between 1982 and 1985, the "Martinez Organization" imported in excess of thirty five tons of cocaine through the Eastern Airlines Enterprise headed by Ruy Martinez. In mid-1985, Bobby Washington, deeply, entrenched within Martinez' Organization, was arrested in a minor cocaine case. At this time, Washington became the first individual involved in the "Martinez Organization" to alert the United States Attorney's Office in Miami, Florida, of all the players within the Martinez conspiracy. Following the August 24, 1985 seizure of incoming cocaine, arguably the final load imported via the Martinez Organization's conspiratorial life, Rick Rahm, Kyle McMahan and Craig Koenig huddled in a motel in approximately October of 1985, thereafter entering into plea agreements with government on November 14, 1985 to fully disclose all information related to the importation of cocaine at MIA. The initial debriefings of Washington would later formulate the basis in which 62 counts were charged in the Eastern Airlines cocaine importation ring which included twenty-four defendants arrest in September of 1986. Washington, Rahm, Koenig and McMahan would become chief testimonial sources

against Ruy Martinez and the litany of co-defendants in the Eastern Airlines "Ruy Martinez Organization" prosecution which ultimately overlapped petitioner's subsequent indictment February 17, 1989. During the initial "Martinez Organization" prosecution, at no time did Rahm, Koenig, Washington, McMahan or any other individual implicate petitioner as a component of that organization, or more importantly, with any suggestion of an independent conspiracy existing in tandem with the "Martinez Organization." In fact, counts nineteen and twenty of the Martinez indictment alleged that Miguel Tapia, along with co-defendants Anchio and Camajo, were responsible for the July 6, 1983 ill-fated 100 kilogram load which Miguel Tapia had been previously convicted on in mid-1984, and sentenced to prison for seven years to which end he'd commenced service on in November of 1984. Likewise, the August 11, 1985 and August 24, 1985 seized loads of cocaine were alleged in the Martinez indictment as part and parcel to Martinez's series of continuing offenses comprising Martinez's continuing criminal enterprise count, along with co-defendant San Martin with regard to the August 24, 1985 seized cocaine load.[7]

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[7] Due to government's outrageous conduct, including knowing use of perjury in obtaining petitioner's numerous superseding grand jury indictments, Miguel Tapia was excised from the Martinez indictment in April of 1989, and included as a co-conspirator in petitioner's case for the time frame of January of 1983 through August 24, 1985. The jury request as to when Miguel Tapia went to jail in petitioner's first trial was never answered. Miguel Tapia was found guilty. Petitioner, on the other hand, had a hung jury in his first trial.

In approximately 1987, Victor Miyares was apprehended while attempting to sell a kilogram of cocaine to federal agents in Broward County, Florida. While in MCC Miami, Fidel Zambrano, already facing some seventy years imprisonment for his role in importating multi-ton loads of cocaine into Tampa, Florida, entered into an immunity pact with government on July 21, 1988. It was incorporated into the plea agreement that Zambrano would not be prosecuted for any offenses related to his importation scheme with Victor Miyares, with further government assurances that in pre-targeting petitioner, Zambrano's "quality and quantity" of testimony would result in government's effort to have Zambrano's sentence reduced.[8]

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[8] Zambrano was originally sentenced to seventy years in the Tampa, Florida case. By the time of petitioner's second trial Zambrano had already had his term of imprisonment reduced to twenty years. Of core concern is the fact that the original Tapia/Miyares indictment returned February 17, 1989 was predicated largely upon Zambrano's debriefings. In reviewing the transcript of the trials below, Victor Miyares claimed he was payed $1,250,000 in cash in approximately July or August of 1985 for the first of three three hundred kilo importations by Mr. Adriano, last name unknown. [R3-18; R4; 7-10; 11/6/90 – 11/7/90] Zambrano, on the other hand, claimed that the $1,250,000 dollar payment was personally given to petitioner while Miyares was present, at Gayzman Corporation, one of Zambrano's businesses. In fact, Zambrano claimed he gave the sum of $750,000 to petitioner, summoned Columbia for the balance of $500,000, to which end Mr. Adriano facilitated remittance of the outstanding balance to Victor Miyares. [R10; 225; 227-28; 11/14/90] Furthermore, Zambrano gave a disjointed version that he had brought $30,000 to petitioner's wife at 2450 S.W. 22nd Terrace, Miami. [R10 253-61; 11/14/90] Following the hung jury, Miyares now claimed during petitioner's retrial, that

Notwithstanding the utter impossibility of obtaining $1,250,000 as payment, with subsequent distribution of $900,000 to Gary Dukes, and $500,000 to petitioner, Rick Rahm had previously testified he had no knowledge of petitioner's involvement in the August of 1985 seized cocaine loads. [R8; 483-85; 3/20/91] In a taped statement given to agents on November 22, 1985, Rahm indicated he had never worked for petitioner importing cocaine. [R8; 478; 3/20/91] However, granted full immunity in the Eastern Airlines "Martinez Organization," Rahm had testified when it served government's interest that he'd performed scheduling for some twenty to thirty incoming importation flights in the "Martinez Organization," between 1982 and August of 1985. [GX-37; R8; 465-68; 3/20/91] In fact, it is evident that in returning the Eastern Airlines indictment, the initial charging of the July 6, 1983 Miguel Tapia 100 kilogram importion, and Miguel's indictment in Eastern, along with the August 11, 1985 three hundred kilogram seizure charged against defendants Martinez, Ovidio Camejo and Raul Anehia, with the latter August 24, 1985 seizure charged against Martinez and San Martin, plainly indicates the prosecution

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Mr. Fidel Zambrano never payed $1,250,000 for the three hundred kilogram load as charged. [R7; 178-183; 3/19/91] On the contrary, Miyares now claimed that he made $1,000,000 from the three three hundred kilogram loads imported in July and August of 1985, giving $500,000 to petitioner. [R7; 183; 3/19/91] Gary Dukes, admittedly entering into agreement with government for a reduction of his nine year Eastern Airlines conspiracy sentence, claimed of the alleged three three hundred kilogram loads in controversy, Miyares payed him $900,000 dollars to be disbursed amongst Conrad Calinau, John Toppin, Frank Cino, Cliff Tash and Rick Rahm. [R8; 392-401; 3/20/91]

proceeded with knowing use of perjury at the grand jury. This is necessarily so due to the fact subsequent indictment of Miguel Tapia and petitioner, for these identical offenses, inescapably indicates the prosecutor, returning numerous times to gain superseding indictments against petitioner, presented either Martinez, Zambrano, Miyares, Rahm, or case agents conducting debriefings, in order to return the ever expanding charges. Unprecedented deviations in witness's testimony, while acting under the direction of government who had pre-targeted petitioner prior to offering contingency based criminal prosecution plea agreements, indeed violated the fundamental due process rights guaranteed under the Fifth Amendment. Condemned in ***Russell,* 411 U.S. at 432 (citations omitted),** petitioner submits he demonstrates the conduct of government was indeed so outrageous that it can be characterized as violative of the fundamental fairness accorded a criminal defendant, shocking to the universal sense of justice. ***Russell, Id.* at 432 (quoted in) *Owen v. Wainwright*, 806 F.2d 1519, 1521 (11th Cir. 1986); *United States v. Rey*, 811 F.2d 1453, 1457 (11th Cir. 1987)** To be certain, government's reach into a ragbag of unethical conduct which, by virtue of the chronology of testimony purported by contingency motivated individuals, multiple superseding indictments charging various conspiracy players with identical offenses, and blatantly contradictory versions which, if at all, exemplify three to four different testimonial renditions all tailored to the prosecution of the moment, constitutes due process violation utterly undermining the integrity of the judicial process. This case presents opportunity to this court to grant certiorari, and define limitations on the extent which

government may utilize with regard to pre-targeting individuals for prosecution, and then entering into contingency based agreements with visible criminal perjurors who have, due to government's sanctioning, joined hands with outrageous conduct by an overzealous prosecutor who today, has stripped an innocent man of his liberty for the rest of his life. It is respectfully submitted certiorari should be granted for review of this troubling issue.

II. WHETHER GOVERNMENT VIOLATES A CRIMINAL DEFENDANT'S COMPULSORY PROCESS WHEN HAVING AN INDICTMENT RETURNED CHARGING THE DEFENSE WITNESS FOR PERJURY BASED UPON THE DEFENSE WITNESS'S TRIAL TESTIMONY WHICH EXONERATED THE DEFENDANT RESULTING IN A HUNG JURY?

A criminal defendant's sixth amendment right to compulsory process is a fundamental component of due process itself. (see) ***Washington v. Texas,* 388 U.S. 14, 18-19, 87 S.Ct. 1920, 1922-1923, 18 L.Ed.2d 1019 (1967); *United States v. Garner,* 581 F.2d 481, 488 (5th Cir.1978)** The certainty is that the right of the defendant to subpeona witnesses in his behalf and to present his version of the facts to a jury is unambiguously guaranteed by the Sixth Amendment. Just so. The drafters of the constitution plainly intended that those who sit accused are afforded the fundamental component of due process of law attending the right to present defense witnesses. ***Washington v. Texas,* 388 U.S. 14, 18-19, *Id.* (emphasis added) (in original):**

> "The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing that the other Sixth Amendment rights that we have

> previously held applicable to the States. This Court had occasion in ***In re Oliver*, 333 U.S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1948),** to describe what is regarded as the most basic ingredients of due process of law. It observed that:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . a right to his day in court . . . are basic in our system of jurisprudence; and these right include, as a minimum, a right to examine the witness against him, to offer testimony, and to be represented by counsel. **333 U.S. at 273 (footnote omitted), 92 L.Ed. at 694, *In re Oliver* (1948)**

> > *The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. (quoting)

***Washington v. Texas*, 388 U.S. 14, 18 L.Ed.2d at p. 1023, *Id.*[9]** (see also) ***Rosen v. United States*, 245 U.S. 467, 471,**

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[9] More fully set forth, *supra* at pp. 6-16, an unprecedented degree of prosecutorial misconduct permeated the instant case. For instance, the original cooperating witnesses, i.e., Washington, Rahm, Koenig and McMahan, provided information which

62 L.Ed. 406, 409, 38 S.Ct. 148 (relying on) ***United States v. Reid*, 12 How 361, 13 L.Ed. 1023 (1852).** It was the wisdom of the Supreme Court when handing down the ***Washington*** decision that a statutory forbiddance for a criminal defendant to introduce testimony from one indicted in connection with the same offense implicated a fundamental right. This right, of course, was the Sixth Amendment right to compulsory processes. ***Washington, Id.* at p. 1025 (citations omitted)** The court reasoned, consistent with the Sixth Amendment, that a rule which disqualified an alleged accomplice from testifying on behalf of a defendant cannot even be defended on the

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led to the July 6, 1983, August 11, 1985 and August 24, 1985 seizures of cocaine to be attributable to the "Ruy Martinez Organization" via testimony at the grand jury, whether it was through their own appearances, or through agent grand jury testimony based upon debriefings. In the face of this grand jury version, tailored renewed versions were presented to the grand jury, resulting in the same offenses being charged against petitioner four years later. This is not to ignore two separate jury trials where these same immunized witnesses visibly altered their testimonial deliveries. At no time did government advise the court, grand jury, or petitioner, that the same offenses that formed the indictment in three different conspiracies returned by the grand jury were charges based upon perjury. Obviously, the seized loads could not possibly be attributable to separate conspiratorial factions. Although required to bring forth knowledge that erroneous information has been presented to the grand jury, ***Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *United States v. Pendin*, 861 F.2d 1522, 1528-30 (11th Cir. 1988)** (see also) ABA Standards for Criminal Justice 3-5.6(a) (1980); Code of Professional Responsibility EC 7-26, DR 7-102(A) (4) (1980); [lawyer shall not knowingly use perjured testimony or false evidence], government instead used the perjury for its own advantageous win at all cost prosecution.

ground that it rationally sets apart a group of persons who are particularly likely to commit perjury. The absurdity of the rule was exemplified by the fact that if the prosecution called an accomplice, it was likely the accomplice *would commit perjury* on government's behalf to improve his own lot. ***Id.* at p. 1025 (emphasis added)** However, a blanket rule precluding an accomplice from testifying for a criminal defendant indeed violated the defendant's compulsory process.[10]

In petitioner's first trial, Carlos Ehrman testified he was an attorney in Panama, heralding from an aristocratic family that was established in that country's economic and business community. During the course of the first trial, Ehrman's threshold testimony established he'd been an attorney since 1971. Educational training included two years at Kemper Military School in Missouri, four years of law school in Panama, and two years

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[10] It was ironic the ***Washington Court*** recognized that "to think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." In the instant case, government knowingly forged ahead with admitted perjurers on a contingency basis on the heels of their breach of plea agreements which specified they would be charged with perjury if they failed to "fully disclose all information" related to the importation of cocaine at MIA. The only individual indicted for perjury, to date, was a legitimate businessman, Carlos Ehrman whose defense testimony resulted in a hung jury in petitioner's first trial. Clearly, government purposely indicted Ehrman in order to add tax counts to petitioner's retrial, and undermine petitioner's compulsory process where Ehrman was the sole investor in petitioner's legitimate business ventures who could exonerate petitioner of government's uncharged "money laundering" theory.

post-graduate education in Spain. [R10-851-52] Jose Ehrman, Carlos Ehrman's father, had been a practicing attorney in Panama for fifty years. The Ehrman family resided in Panama since the early nineteenth century, owning clothing stores, apartments, villas, charter boats, interest in insurance, with Erhman's father a founding member of the Banco General. [R10-853-54] Ehrman practiced from the Commercial Building, Boulevard El Dorado. In approximately December of 1989, substantial fire damage occurred at the building during the military invasion aimed at apprehending Manuel Noriega, Ehrman candidly stated the entire building was not burned down, but damage was extensive. [R10-855-56]

Ehrman knew petitioner since approximately 1983 when petitioner and his wife, Raquel Tapia were attending lunch. A warm familial friendship developing, Ehrman would visit the United States over the next several years where, amongst other things, he enlisted petitioner's services as a consultant for Pacific Rainbow Corporation, one of the few owned by Ehrman in Panama's "free zone market." [R10-903] Ehrman described his function as a Panamanian attorney including the opening of corporations. Since 1927, Panamanian law regulated the fashion in which corporations could be opened. Geared at generating economic investments in that country, any person would contact Ehrman, or an attorney, who would charge a fee of $1,500 to $3,000 dollars to list and establish the corporation for the individual. Once satisfying public registry fees, corporations would be owned through a "bearer shares" process. This is to say that the individual who opened the corporation would, by possessing the "bearer share" certificate, have claim to that corporation. [R10-859-60] The owner merely payed the

electricity contracts, utilities etc., and other incidental business operation expenses. Ehrman was adamant he never opened, nor possessed, any corporate "bearer shares" on petitioner's behalf. He did emphasize that he opened a Limousine Service with petitioner in approximately 1983. Proving lucrative, petitioner realized a significant but modest cash income from that source. [R10-862-66] Likewise, in approximately 1985, Ehrman utilized petitioner's services as a consultant to invest in American real estate. Ehrman, through his own corporation known as Pacific Rainbow Corporation, purchased the 400 Solano Prado home in Coral Gables, for $545,000. [R10-867-68] Ehrman's net personal worth was approximately $2,000,000 aside from his family's independent income and wealth. [R10-869] Surrounding some $4,000 in property taxes due, Ehrman provided that cash to petitioner to give to Mr. Santana, one of petitioner's tax attorneys. [R10-870-71; GX-65; GX-82] In 1986, Ehrman loaned petitioner approximately $200,000 as an investment in Euro Auto Parts, a vehicle parts business geared at supplying foreign luxury replacement parts, listed with the State of Florida. Ehrman similarly invested approximately $55,000 for the purchase of two airplanes through FAT FERNANDO CORPORATION, one of petitioner's diverse and enterprising businesses, legitimately registered with the State of Florida. [R10-880-83] Ehrman testified he opened some four corporations for Victor Miyares in Panama. Ehrman charged Miyares $1,250 per corporation to list them in compliance with Panamanian law. Ehrman was emphatic he never opened a "bank account" for Victor Miyares at any time. Nor would government ever produce any banking documents which would support its misstatement that Ehrman did. [R10-886-87]

Ehrman was clear that petitioner was a credible businessman. Similarly, that since the default of the Euro Auto Parts business, petitioner's word to repay those loans sufficed to assure Ehrman he would recover his loan investment. [R10-897-98] During cross examination Ehrman could not specifically recall the second $50,000 loan to Euro Auto Parts. And last, in approximately June of 1989, he provided the documents related to the 400 Solano Prado purchase to Juan Cayado, available to government verifying the validity and legality of Ehrman's purchase of that property. [R10-917-18; DX-7] In the face of government's theory that financial gains by petitioner demonstrated assets deprived from unlawful profits through cocaine importation, Ehrman's credible testimony was a crucial component of the defense position of absolute innocence.

The Second Circuit met with complaint that government purposely indicted an individual following a defendant's arrest in order to undermine the defendant's sixth amendment compulsory processes in ***Buie v. Sullivan*, 923 F.2d 10 (2d Cir. 1990).** The ***Buie Court*** held that unless a defendant can show bad faith on the part of the government, interference with potentially useful evidence does not constitute a denial of due process. (see) ***Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)** It was held, in a case of first impression, that to sustain a compulsory process violation, a defendant must show a materiality, bad faith, and fundamental fairness deprivation. ***Buie, Id.* at p. 12 (emphasis added)** Under the "materiality" factor, Ehrman's testimony legitimized the purchase of the house at Solano Prado, the investment capitol in Euro

Auto Parts, and petitioner's salary which accounted for his living in the Coral Gables residence. Thus, the "materiality" of his testimony was critical to advise the jury petitioner's comfortable living arrangements were not the product of illegally gained assets. Second, under the "bad faith" factor, when a hung jury resulted in the first trial, government had Ehrman indicted for perjury based upon his testimony which, if at all, was one of the few witness versions grounded in truth. The fact that in petitioner's second trial, after Ehrman had been indicted for perjury, that the court accepted a verbatim reading of Ehrman's previous testimony, indicates that the testimony was truthful or the district court would not have allowed it in. And last, or the fundamental fairness of the trial factor, it is petitioner's contention that his trial was rendered fundamentally unfair by the absence of Ehrman. There was no other witness who could replace Ehrman's testimony which indicated petitioner was not involved in any dubious Panamanian dummy corporation fronts, a claim which Victor Miyares was pushing under government's direction, to lead the jury to believe that money laundering was the purpose of the corporation openings in that country. Thus, under the three point ***Buie*** analysis, petitioner demonstrates his main defense witness, and chief defense theory, that he was a legitimate businessman with Carlos Ehrman, was utterly deprived. Clearly, the indictment of Ehrman was purposely facilitated by government to gain the tactical advantage during retrial of eliminating credible witness testimony that would support petitioner's claim of innocence, and damage Victor Miyares' claim of money laundering through Ehrman, otherwise unsupported by the record whatsoever. In this regard, petitioner respectfully submits certiorari review

should be granted, with establishment of a guideline surrounding violation of a defendant's compulsory process.[11]

III. WHETHER THE KNOWING USE OF PERJURY TO FABRICATE A CRIMINAL CASE VIOLATES A DEFENDANT'S DUE PROCESS OF LAW CONSTITUTING A MISCARRIAGE OF JUSTICE?

It is well established doctrine that government's knowing use of perjury constitutes a due process violation. And in fact, when governmental conduct has so far exceeded the acceptable norms of conduct normally contained within the parameters of the due process clause of the fifth Amendment, this court may exercise its supervisory powers to vindicate a defendant's rights, as well as preserve judicial integrity and/or deter illegal or improper conduct by government. ***United States v. Hastings*, 461 U.S. 449, 505 (1983) (also) *United States v. Carrasco*, 786 F.2d 1452, 1455 (9th Cir. 1986); *United States v. Simpson (II)*, 927 F.2d 1088, 1090 (9th Cir. 1991)**

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[11] In reviewing the lower court briefs, it is stressed that once the prosecutor realized the testimony of Carlos Ehrman could not be overcome by Victor Miyares' claim he had opened a $900,000 cash account in the Union Bank of Switzerland in Panama; allegedly an uncharged money laundering scheme which Ehrman knowingly participated in, the prosecutor vindictively had Ehrman indicted for perjury. To effect this unethical plan, both the prosecutor and Paul Mangone, DEA, went to Panama in January of 1991 where, according to Mangone, their visual observation of the Ehrman offices did not indicate "fire" damaged his business. This completely ignored the water and smoke damages which were so extensive the U.S. Military kept the area cordoned off for ten days following the Noriega bombing during his apprehension. [R12-1039-1041]

The Ninth Circuit, acting under this court's supervisory jurisdiction, recognizes that an important function of supervisory power used by federal courts is to guarantee that federal prosecutors act with due regard for the integrity of the administration of justice. ***United States v. Basurto,* 497 F.2d 781, 793 (9th Cir. 1974) (Hufstedler, J. concurring)** It is further recognized that a federal court may use its supervisory power to dismiss an indictment on the basis of governmental misconduct. ***United States v. Owen,* 580 F.2d 365, 367 (9th Cir. 1978)** (dismissal appropriate when used as a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature. *See also* ***United States v. Samango,* 607 F.2d 877 (9th Cir. 1979)** (approving dismissal to cure cumulative effect of errors) Government first pre-targeted petitioner for prosecution with Eastern Airlines defendants who previously disclosed all they knew of cocaine smuggling at MIA. Next, some four years later, government returned to these individuals to transpose their original versions into versions which implicated petitioner. This required indictment shopping at the grand jury where the offenses, in light of the July 6, 1983, August 11, 1985 and August 24, 1985 seizures being attributed to the "Ruy Martinez Organization," were to suddenly be attributable to petitioner. ***Pyle v. Kansas,* 317 U.S. 213, 87 L.Ed. 214, 63 S.Ct. 177; *Napue v. Illinois,* 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959); *United States v. Basurto,* 497 F.2d 781, 793 (9th Cir. 1974)** Certainly, having previously prosecuted the offenses in the 1986 Eastern Airlines trial, there can be no argument that the government, returning to the grand jury on more than a few occasions, was well aware that distinctly different conspiratorial groups were being charged with the same

offenses. But the misconduct does not stop here. During the two ensuing trials, two distinguishable versions were purported by government through its witnesses. Miyares claimed he picked up the $1,250,000 in cash from "Adriano" for a successful three hundred kilograms importation. He claimed he only made $1,200,000 in his entire participation in the cocaine importations. Yet he alleged he spent $349,000 on vehicles, lost $500,000 in three businesses, lost $500,000 to Virgilio Quinones, gave $25,000 to his attorney, notwithstanding his multitude of other "loans" which were in the $50,000 category. [R1;15-38; 11/6/90; R2;7-80; 117-119; 11/7/90; R-7; 171-311; 3/19/91] Likewise, Zambrano claimed he had no money, "no pesos," although he'd made millions from twenty years of international drug smuggling. Separately, he had a California arrangement, undisclosed to the defense, where Idelberto Rodriguez was distributing kilograms of cocaine. This is not to ignore the fact Zambrano had arranged a contract killing, undisclosed by government with regard to immunity. Nor was there an explanation how Zambrano allegedly gave $750,000 to petitioner and Miyares at his office for the three hundred kilogram load, in direct conflict with Miyares version Adriano gave him the entire sum. [R10; 272-83; 11/14/90] Nor could David Duke's version that Miyares paid him $900,000 for the three three-hundred kilogram loads be rationally connected to the Zambrano-Miyares version of payment on these ill-fated loads, only one which was allegedly ever paid. [R8; 376-79; 3/20/91] Martinez provided another version which came on the heels of government's knowing use of perjury and suppression of inducements. Martinez, like Zambrano and Miyares, made millions. Although required to forfeit his ill gained assets, he lied

to Judge Scott surrounding some $7,000,000 he still had in cash. Government knew of this misrepresentation, yet still moved for a reduction of his sentence. [R9; 587-88; GX-80; 3/21/91; R10; 344-75; 11/14/90] To be sure, government not once approached the court in petitioner's case, in the face of these visible inconsistent versions, to advise the court that witnesses had previously testified in direct contradiction to the testimony being elicited. ***Brown v. Wainwright,* 785 F.2d 1457, 1464 (11th Cir. 1986); *United States v. Foster,* 874 F.2d 491, 494-95 (8th Cir. 1988); *Napue,* 360 U.S. 264, 269 (1959) (citations omitted)** Government's case rested entirely upon the credibility of its immunized witnesses. Thus, the fact government did not disclose tacit agreements surrounding the retention of assets in the millions by its witnesses in chief, plainly evidences the "tip of the iceberg" of a clandestine tacit deal. (see) ***United States v. Shaffer,* 789 F.2d 682 (9th Cir. 1986); *Giglio v. United States,* 405 U.S. 150, 154, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972); *United States v. Bagley,* 473 U.S. ___, 87 L.Ed.2d 481, 105 S.Ct. ___ (1985).** With the credibility the decisive factor, the knowing use of perjury, suppression of inducements and use of some three different versions from the identical witnesses to convict members of the "Martinez Organization," the Tapia Organization and last, the San Martin conspiracy, all grounded in grand jury testimony that returned those indictments based upon tailored testimony, was material to the outcome of petitioner's case. ***Bagley,* 473 U.S. 667 (1985)** Unprecedented prosecutorial misconduct permeated the judiciary in petitioner's case. Seeking to win at all costs, ***Berger v. United States,* 295 U.S. 78, 88, 79 L.Ed. 1314, 55 S.Ct. 629 (1935),** the record of the instant case fully supports a miscarriage of justice has occurred. Petitioner has been literally convicted on the strength of overzealous prosecution effort to advance

a case based upon use of perjury at the grand jury, perjury in trial, and suppression of inducements to witnesses who formed the basis of the testimony that resulted in petitioner's conviction. In this regard, it is urged that certiorari should be granted for review of the record comprising the instant case. It is further urged that a guideline which condemns the prosecutorial fabrication of a criminal case is established by this court for the preservation of the integrity of the judiciary, and to restore petitioner's liberty. To date, petitioner has been unjustly convicted due to governmental misconduct. Such offends the traditional values of a constitutionally based forum where guilty should be punished, but the innocent should not suffer.[12]

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[12] A rich pool of documented miscarriages of justice grounded in use of informants and immunized witnesses exist. See H.A. Bedau and M.L. Radelet, *Miscarriages of Justice in Potentially Capitol Cases,* 40 Stan. L. Rev. 21, 56-57 (documenting 117 cases involving wrongful convictions of innocent people including perjury by prosecution witnesses); Mark Thompson, *The Truth About Lies,* Cal. Law. 15 (Feb. 1989) (need for new rules regarding use of informants made clear by Leslie Vernon White revelations in Los Angeles, California, where the Los Angeles grand jury, investigating use of jailhouse informants, found that reinvestigation of over 100 felony cases was required due to the disinclination of informants to follow societal rules and to defile their oath to testify truthfully) (Report of the 1989-1990 Los Angeles grand jury dated June 26, 1990 at 16, Bernal-Obesco, 93 Daily Journal D.A.R. at 3916; *See* L. Hellman, Scoundral Time, inclusive in above report. The issue of the use of immunized witness testimony where the contract with government allows a ready release for the previously convicted criminal in exchange for testimony against an individual simply invites perjury. The source of the information, i.e., a confessed criminal, is a visible use of an unethical person who will say anything to effect an improvement for their own situation.

CONCLUSION

For the foregoing reasons, it is most respectfully submitted petition for writ of certiorari to the Eleventh Circuit Court of Appeals should be granted.

Respectfully submitted,

DATED: July, 1993

/s/ Fernando Tapia
FERNANDO TAPIA
Reg. #34421-004
U.S.P. Terre Haute
P.O. Box 33 (Unit B-2)
Terre Haute, Indiana 47808

*For the petitioner

*In Pro Se

I, Fernando Tapia, hereby declare the foregoing to be true under penalty of perjury on June 28, 1993 at P.O. Box 33 Terre Haute, Indiana 47808 in pro se.

/s/ Fernando Tapia
FERNANDO TAPIA
P.O. Box 33 (Unit B-2)
Terre Haute, Indiana 47808

* For the petitioner

* In Pro Se

DATED: July, 1993
MICHAEL A. LOWERY
Vigo County
Commission Exp:
October 31, 1995

APPENDIX 'A'

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5483

D. C. Docket No. 89-75-CR-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO TAPIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed March 4, 1993)

Before COX, Circuit Judge, JOHNSON, Senior Circuit Judge, and ALAIMO*, Senior District Judge.

PER CURIAM: AFFIRMED. *See* 11th Cir. Rule 36-1.

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* Honorable Anthony A. Alaimo, Senior U.S. District Judge for the Southern District of Georgia, sitting by designation.

APPENDIX 'B'

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names of Parties

May 13, 1993

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 91-5483 USA v. Tapia
DC DKT NO.: 89-00075 CR-FAM

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,
/s/ Miguel J. Cortez
MIGUEL J. CORTEZ, Clerk

Reply To: Bobby McDonnell
(404) 331-3833

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5483

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO TAPIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Filed May 13, 1993)

Before: COX, Circuit Judge, JOHNSON, Senior Circuit Judge, and ALAIMO*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

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* Honorable Anthony A. Alaimo, Senior U.S. District Judge for the Southern District of Georgia, sitting by designation.

Appellate Procedure, Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible R. Cox
UNITED STATES CIRCUIT JUDGE